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September 28, 2007

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Federal Election Commission
999 E Street, N.W.
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Re: Comments on Notice of Proposed Rulemaking (Electioneering Communications)

Dear Mr. Katwan:

The American Association of Advertising Agencies, the American Advertising Federation, and the Association of National Advertisers respectfully submit these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on August 31, 2007, regarding Electioneering Communications (Notice 2007-16). 72 Fed. Reg. 50261 (August 31, 2007).

We file these comments to highlight the First Amendment concerns that animate the Supreme Court's decision in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) ("*WRTL II*"), which should guide the Commission in implementing that ruling. We also offer comments on the Commission's proposal for business advertisements.

As discussed below, we strongly believe that the regulations should enable advertisers to distinguish easily between those advertisements still subject to prohibition and those entitled to Constitutional protection. With the exception of a proposed safe harbor, the FEC's draft regulations merely repeat the language of the ruling, rather than implement it. Moreover, the safe harbor proposed in the NPRM for commercial advertising introduces needless ambiguity and protects only those commercial advertisements that could not possibly be construed as concerning an election – a test far more stringent than the one adopted by the Supreme Court. We offer an alternative safe harbor that more accurately reflects the breadth of the Supreme Court's ruling and provides greater certainty to commercial advertisers. Absent further guidance from the Commission, advertisers will be chilled in the exercise of their Constitutional rights and will be left only with the impractical alternatives of seeking pre-approval from the FEC through its advisory opinion process or a declaratory judgment from a court.

I. WHO WE REPRESENT

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, online, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas.

The American Advertising Federation (AAF), headquartered in Washington, D.C., acts as the "Unifying Voice for Advertising." The AAF is the oldest national advertising trade association, representing 50,000 professionals in the advertising industry. The AAF has a national network of 200 ad clubs located in ad communities across the country. Through its 215 college chapters, the AAF provides 6,500 advertising students with real-world case studies and recruitment connections to corporate America. The AAF also has 130 blue-chip corporate members that are advertisers, agencies and media companies, comprising the nation's leading brands and corporations.

The Association of National Advertisers (ANA) leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 350 companies with 9000 brands that collectively spend over $100 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

II. THE COMMISSION'S REGULATIONS SHOULD REFLECT THE BREADTH OF THE SUPREME COURT'S RULING, AND ENABLE ADVERTISERS TO JUDGE EASILY WHETHER AN ADVERTISEMENT IS CONSTITUTIONALLY PROTECTED

A. The Importance of WRTL II's First Amendment Analysis

The Supreme Court's decision in *WRTL II* stands as a forceful assertion of First Amendment rights, in general, and a recognition of the rights of advertisers who deliver their messages through the media of broadcast, cable and satellite. The decision confirms that ads which on their face do not advocate for or against a candidate cannot be banned from the airwaves by the government. In strong and clear terms, the Chief Justice stressed that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 2669. Moreover, "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we *do* have to decide – we give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech' demands at least that." *Id.* at 2674.

Each of our associations has a long history of speaking out on behalf of the First Amendment rights of the advertising community. We were, therefore, heartened by the Court's *WRTL II* decision. We note with some concern, however, that the First Amendment considerations that animate the Chief Justice's opinion go virtually unmentioned in the NPRM – as if they bear no value in the task at hand. We believe the FEC must keep these considerations at the forefront of its analysis because these constitutional concerns determine where the lines between protected and prohibited activity can and must be drawn.

Our associations are also firmly of the view that regulations implementing *WRTL II* must ensure, in practical terms, that even where there may be reasonable debate about whether an advertisement serves commercial interests or advocates for the election or defeat of a candidate, the advertiser need not come to the government for pre-approval, but may go forward. To do less would chill the full exercise of First Amendment rights. As discussed more fully below, the shortcoming of the safe harbor proposal in the NPRM is that it offers shelter from prosecution only to those advertisements that can engender virtually *no debate* about their intentions. In all other cases, advertisers are left to guess as to how the Commission would implement the Supreme Court's ruling.

B. The WRTL II Holding Extends to Commercial and Business Advertisements

Our associations' greatest concerns are focused on the question posed in the NPRM regarding commercial and business advertisements. The Commission asks for comment on whether "the holding in *WRTL II* [is] limited in application to communications that contain issue advocacy or grassroots lobbying, or does the holding extend to other types of communications such as business and commercial advertisements?" 72 Fed. Reg. at 50269. We believe that the First Amendment interests expressed in *WRTL II* are equally availing with respect to advertisements that meet the definition of electioneering communication and have a business or commercial purpose. The Supreme Court's ruling cannot reasonably be read any other way. Nor does Court precedent on commercial speech dictate a different conclusion.

For over three decades, the Supreme Court has recognized that First Amendment guarantees extend to commercial speech. *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Commercial speech has been acknowledged to serve not just the economic interest of the speaker. It also assists consumers and furthers the societal interest in the fullest possible dissemination of information. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561-562 (1980). So long as we have a predominantly free enterprise economy, the allocation of resources in large measure will be made through private economic decisions. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-497 (1996). The Supreme Court has deemed it "a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Id.* at 497.

The Supreme Court has reaffirmed on many occasions that commercial speech should be strongly protected by the First Amendment:

> The commercial marketplace, like other spheres of our social and cultural life provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Thompson v. Western States Med. Ctr., 122 S. Ct. 1497, 1503 (2002) (citation omitted). Consequently, the regulation of speech "must be a last – not first – resort," *Id.* at 373, and it may not be more extensive than necessary to serve the government's interest. *Id.*, at 371. As the Chief Justice noted more than once in *WRTL II*, a violation of the electioneering communication prohibition is a crime. Surely it exceeds Constitutional bounds to criminalize advertisements for a book or a car dealership merely because they feature a federal candidate.

In asking about the applicability of *WRTL II* to commercial speech, the Commission suggests that, based on prior rulings, the Court might come to a different conclusion about the applicability of the electioneering communications prohibition to commercial speech. The Commission refers to a line of Supreme Court cases applying an intermediate test – one less demanding than "strict scrutiny" – when reviewing government restrictions on commercial speech. The Commission asks whether *WRTL II* modified this line of cases as they concern the appropriate review in commercial speech cases. We believe that these concerns about the prior Supreme Court rulings in commercial speech cases are simply misplaced.[1]

First, while courts may distinguish between commercial and non-commercial speech in evaluating First Amendment restrictions, under either test the burden of justifying the provision belongs to the government. Under the commercial speech test, the government must show a substantial interest to be achieved through the restrictions, and that the restrictions are designed carefully to achieve the goal. *Cent. Hudson,* 447 U.S. at 563–565. "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart,* 517 U.S. at 502 (citations omitted). The law at issue here, however, has nothing to do with concerns about protecting consumers from commercial harms; it can only be defended as a means to regulate express advocacy or its functional equivalent. Any other

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[1] As discussed below, the level of scrutiny applicable to restrictions on commercial speech is not relevant to the question of the applicability of *WRTL II* to commercial speech. Our associations have, however, consistently maintained that commercial speech is just as important as noncommercial speech. Moreover, several Justices have expressed concern with the application of the intermediate level of scrutiny to all restrictions on commercial speech. *Cent. Hudson*, 447 U.S. at 566 n.9; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *44 Liquormart*, 517 U.S. at 517 (Thomas, J., concurring); *Id.* at 517 (Scalia, J., concurring).

argument would be nonsensical. Thus, under the commercial speech test, the government has even less of an argument than it asserted in *WRTL II*.

Second, in practical application, the test articulated by the courts for reviewing prohibitions on truthful and nonmisleading commercial messages is functionally indistinguishable from strict scrutiny. In *44 Liquormart*, the Court observed:

> In this case, there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with 'special care . . . mindful that speech prohibitions of this type rarely survive constitutional review.

517 U.S. at 504 (citation omitted). The Court further observed that in cases involving prohibitions on nonmisleading speech, "there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 501. Indeed, federal courts faced with laws that apply to both commercial and non-commercial speech have concluded that strict scrutiny is the appropriate level of review. *Coyote Pub., Inc. v. Heller*, 2007 WL 2254702 at 3 (slip op. Aug 3, 2007); *U.S. v. Williams*, 444 F. 3d 1286 (11th Cir. 2006).[2]

Finally, in *WRTL II* the Chief Justice explicitly "reject[ed] the argument that issue advocacy may be regulated because express election advocacy can be, and 'the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy. . . . This greater-includes-the-lesser approach is not how strict scrutiny works." 127 S.Ct. at 2671 (citation omitted). Likewise, genuine business or commercial advertisements should not be swept up in a speech prohibition because the speech is less "core" than political speech. Indeed, the Chief Justice concluded as much, noting that "[a] corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less 'core' than corporate speech about an election, which we have held may be restricted." *Id. Cf. Liquormart*, 517 U.S. at 510 (rejecting a "greater-includes-the-lesser" argument to justify a ban on advertising simply because of government's power to ban the underlying conduct).

C. A Safe Harbor for Commercial Advertisements Must be Broader and Clearer Than is Proposed to Avoid Chilling Protected Speech

The Commission asks for comment on whether a safe harbor for commercial advertisements is appropriate, and if so, whether the safe harbor proposed in the NPRM is the

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[2] *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) ("Even if one accepts the premise that commercial speech generally is entitled to a lower level of constitutional protection than are other forms of speech, it does not follow that [limiting the content of commercial speech for reasons unrelated to preservation of a fair bargaining process] deserve anything less than strict scrutiny.") (Thomas, J., concurring in part and concurring in the judgment).

right one. We strongly endorse the use of a safe harbor for genuine commercial advertising that meets the prerequisites of an electioneering communication. However, to give meaningful effect to the Supreme Court's ruling and enable advertisers to determine for themselves whether proposed advertisements are subject to prohibition or enjoy Constitutional protection, the safe harbor must be broader and clearer than the one proposed in the NPRM.

In *WRTL II* the Supreme Court held that only advertisements that are express advocacy or its functional equivalent may be regulated. 127 S.Ct. at 2664. "The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a *safe harbor* for those who wish to exercise First Amendment Rights." *Id.* at 2665 (emphasis added). The Court defines the parameters of its "safe harbor" in broad terms: "[A]n ad is the functional equivalent of express advocacy *only* if the ad is susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667 (emphasis added).

In order to "safeguard this liberty," the Court stressed that the application of this test should turn on "the substance of the communication, rather than amorphous considerations of intent and effect . . . . And it must eschew 'the open-ended rough-and-tumble of factors. . . . '" *Id.* at 2666. The proper standard "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* If disputed cases must be resolved in such a manner, then it stands to reason that advertisers must be able to make day-to-day decisions with reasonable ease and confidence.

As discussed above, the "safe harbor" established by the Supreme Court protects all ads that meet the statutory prerequisites of an electioneering communication unless from the face of the ad the *only* reasonable interpretation is that the ad is an appeal to vote or against a specific candidate. Unfortunately, the FEC rule contemplates a much smaller First Amendment port of call. Furthermore, the proposed safe harbor injects ambiguity that will make it difficult for advertisers to determine, without fear of prosecution, whether a particular ad may be run.

The first prong effectively turns the Supreme Court decision on its head. Instead of looking at the ad to determine whether the *only* reasonable interpretation is as an appeal to vote for or against a specific candidate, the advertiser must determine whether the ad "exclusively advertises a Federal candidate's or officeholder's business or professional practice or any other product or service." Take the example of the car dealership ad that appears in the NPRM at 72 Fed. Reg. 50270. Rather than saying the dealership has been "taking care of our customers," suppose the ad stresses the honesty and trustworthiness of the dealership, perhaps citing a longstanding "no-haggle" policy. Does such an ad "exclusively advertise" the dealership by attesting to its corporate ethics, or does it also attest to the owner/candidate's character and fitness for office?

The second prong is equally problematic. Here, the communication must be "made in the ordinary course of business of the entity paying for the communication." The NPRM asks: "How should the Commission determine what constitutes an entity's 'ordinary course of

business'? Should the Commission review the advertising or history patterns of the entity paying for the communication in order to evaluate this prong of the safe harbor? If the entity is a newly established business, should the fact that it has never before distributed broadcast advertisements indicate that it is not operating in the 'ordinary course of business'?" 72 Fed. Reg. at 50270.

This is precisely the kind of test the Supreme Court rejected. The Court was quite clear that the Constitutional test for running an ad must be objective and focus on the substance of the communication. The Court ruled out a role for "contextual factors. . . [apart from] basic background information that may be necessary to put an ad in context – such as whether an ad 'describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future. . . ." *WRTL II* at 2669. An inquiry into whether an ad is produced "in the ordinary course of business" is inherently fact-specific and necessarily looks to information outside the four corners of the communication.

The Advisory Opinion issued by the Commission to *Citizens United* (AO 2004-30) illustrates the problem. There, the requestor asked, in part, whether broadcast advertisements for a film and book that would identify Senator Kerry and air during the blackout periods would be prohibited electioneering communications (because they would be funded by a corporation and air in the relevant time periods) or whether they were entitled to the media exemption. The Commission concluded that Citizens United was not entitled to the media exemption for film advertisements based on the fact that "Citizens United does not regularly produce documentaries or pay to broadcast them on television. In fact, the information that [Citizens United] provided indicates that Citizens United has produced only two documentaries since its founding in 1988, both of which it marketed primarily through direct mail and print advertising, and neither of which it paid to broadcast on television." AO 2004-03, p. 6. Under the proposed "ordinary course of business" prong, this is the kind of inquiry that will occur in every case.

Moreover, the "ordinary course of business" requirement appears designed as a proxy for the speaker's intent. In other words, if the advertiser has not run similar ads before or with the same frequency, the ad in question should be viewed as intended to have an electoral purpose; but if the advertiser *has* run similar ads before and has done so just as often, then the same advertisement would be constitutionally protected. The Court rejected this approach, too, noting that "[a] test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." 127 S.Ct. at 2666.

The third prong presents significant problems with over-breadth. It requires that the communication not mention <u>any</u> election, candidacy, political party, opposing candidate or voting by the general public. Thus, an advertisement for a book about past elections, with a title such as "*From FDR to Ronald Reagan: Critical Elections in American History,*" could not be aired in the blackout periods. Certainly, such a result is inconsistent with the WRTL II decision as well as the statute.

Finally, the fourth prong introduces similar ambiguity as exists with the first prong. Take the car dealership example, again. Does an ad that stresses the honesty and trustworthiness of the dealership, noting that it has been owned and operated by the candidate/officeholder for two decades, "take a position on [the] candidate's or officeholder's character"? Or does such an ad take a position only on the dealership's reputation for honesty? What if the candidate appears in the ad and emphasizes that he has been a hands-on owner for 20 years? Or says that he has personally ensured that the dealership deals honestly with its customers? Alternatively, would references to the dealership's active support of the community "take a position" on the candidate's fitness for office, or not?

We propose a different safe harbor, one that captures the breadth of the Supreme Court's ruling and that provides the protection from uncertainty that the Court in *WRTL II* deemed critical:

> Commercial and business advertisements. Any communication that:
>
> (A) Advertises a Federal candidate's or officeholder's business or professional practice or any other commercial product or service; and
>
> (B) Does not mention any current or future election, candidacy, or opposing candidate, or refer to voting by the general public or any political party.

We recognize that in practical application there may be doubt or disagreement about the purpose of an ad for a business or product if the advertising is new or differs from ads run before the owner was a candidate. Or the ad may raise suspicion by implying that the character of the business is a reflection of the character of the owner/officeholder. Or the ad may run more frequently while the owner is a candidate. But the Court in *WRTL II* has already spoken to such concerns and provided an answer. Even in such circumstances, an ad with the attributes of our proposed safe harbor "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate. . . ." *Id.* at 2670.

We also endorse the Commission's suggestion to provide examples of protected and prohibited advertisements. In addition to the examples provided in the NPRM, we urge that examples be included to cover advertisements for books, movies, or plays, and tourism promotions.

D. No Reporting Obligations for Organizations Protected by WRTL II

There is no legal rationale for subjecting to the electioneering communication reporting regime ads that are protected under the *WRTL II* decision. Further, such an obligation would impose significant burdens on advertisers and would chill the full exercise of their First Amendment rights.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court addressed the appropriate standard for evaluating reporting obligations for contributions and expenditures. The Court observed that since compelled disclosures have the potential for substantially infringing the exercise of First Amendment rights, the subordinating interests of the government must survive exacting scrutiny. There must also be a substantial relation between the governmental interest and the information required to be disclosed. *Id.* at 64. In *Buckley,* the Court upheld compelled disclosure of campaign contributions based on three factors. First, the disclosure provides the electorate with information as to the source of campaign funds. Second, the disclosure deters actual corruption and avoids the appearance of corruption. Third, disclosure requirements are an essential means of gathering the data necessary to detect violation of the contribution limitations. *Id.*, at 66-68. Similarly, the Court upheld the reporting requirement for "expenditures" after it construed that term to encompass only express advocacy. As so construed, the requirement survived scrutiny because it served important informational interests regarding those who support candidates through what is "unambiguously campaign related" speech. *Id.*, at 81.

No similar justifications can be found for advertisements that are by definition not express advocacy or its equivalent and, thus, unrelated to campaigns. Thus, the legal underpinnings for reporting articulated in *Buckley* are wholly absent for ads protected by the *WRTL II* decision.

The imposition of a reporting requirement on commercial ads also substantially burdens their First Amendment rights. Under such a regime, an advertiser would have to set up a compliance system that tracks the cost of its ads at the commencement of each blackout period, compute each $10,000 increment of such ads, and then make the requisite filings at the FEC. This may be a reasonable burden for someone attempting to influence an election, but it is overly burdensome for someone selling cars, ice cream or any other product or service. We are concerned that advertisers faced with these reporting demands will simply choose not to run their advertisements. A reporting and disclosure regime is inconsistent with the zone of safety created by the Supreme Court for advertisements that can reasonably be interpreted as concerning something other than an election campaign.

III. CONCLUSION

As the Supreme Court observed nearly 30 years ago, "[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (citations omitted). It would fly in the face of *WRTL II* for advertisers to operate in fear of prosecution by the Federal Election Commission or the Justice Department simply because a federal candidate appears, or is mentioned, in a genuine advertisement for a service or product, and the ad airs during the periods and to the audience covered by the electioneering communications rule.

As with any court decision, *WRTL II* sets forth general principles and applies them only to the few ads at issue in the case. The draft regulations suggest little about how the Commission would apply the ruling. Moreover, the draft regulations provide a safe harbor only for ads as to which there can be no doubt about their commercial or business purpose. That test, of course, is far more restrictive than the test announced by the Court.

We urge the Commission to adopt the safe harbor proposed here and ensure that the electioneering communications prohibition does not chill commercial speech.

Respectfully submitted,

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